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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1951

No. [redacted] 45

WILLIAM B. MACK,

Petitioner,

vs.

PETER MALES ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION AND PROOF OF SERVICE

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
I. Summary statement of matter involved	1
II. Jurisdictional statement	2
III. Questions presented	4
IV. Reasons relied on for allowance of writ	4
V. Prayer for writ	5
Brief in support of petition for writ of certiorari	7
VI. Opinions of courts below	7
VII. Jurisdiction	7
VIII. Statement of the case	8
IX. Specification of errors	12
X. Argument	12
Summary of Argument	12
Point A	12, 13
Point B	12, 17
Point C	13, 20
Conclusion	22
Relief Sought	22

TABLE OF CASES CITED

Aetna Casualty Surety Company vs. Yeatts, 122 Fed. 2d 350	2, 5, 14
Baltimore & Carolina Line Inc. vs. Redman, 295 U.S. 654	2, 8, 18
Emanuel vs. Kansas City Title & Trust Company, 127 Fed. 2d 175	2, 4, 14
Montgomery Ward & Company vs. Duncan, 311 U.S. 243	8, 18
Simmonds vs. Capital Transit Company, 147 Fed. 2d 570	18
Slocum vs. New York Life Insurance Company, 228 U.S. 364	2, 8, 18

TABLE OF STATUTES CITED

28 U.S.C. 347 (a)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. .....

WILLIAM B. MACK,
Petitioner and Appellant below,

vs.

JAMES MALES ET AL.,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action at law brought in the District Court of the United States for the Eastern District of Michigan, Southern Division by petitioner herein, against Peter Males and James Males respondents herein for damages as a result of the false arrest and malicious prosecution of your petitioner. The trial was by jury and a verdict was had and four special questions were answered in favor of the petitioner. Judgment notwithstanding the verdict was entered however in favor of the respondents for

no cause of action without the requisite proper prior motion for a directed verdict having been made. An appeal from said judgment was taken by your petitioner to the Circuit Court of Appeals of the United States, Sixth Circuit, which affirmed the judgment of the District Court. The principal questions involved on said appeal were whether or not there was any material evidence taken in the light most favorable to the petitioner upon which a reasonable jury could have found for the petitioner, and whether or not a trial court could enter judgment notwithstanding the verdict when no prior motion for a directed verdict had been properly made. These questions were decided by said Circuit Court of Appeals and materially affected the determination of said appeal (Record P. 311).

II.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because this case involves "an important question of federal law, which has not been, but should be, settled by this court" (Supreme Court Rule 38, par. 5 (b)).

This court has never decided whether or not it is mandatory under Federal Rules of Civil Procedure, 50 (b) that a motion for a directed verdict must be made before judgment non obstante verdicto can be entered by the trial court.

It is true that this question has been passed upon by various District Courts and Circuit Courts of Appeals holding generally that this can not be done (*Emanuel vs. Kansas City Title & Trust Co.*, 127 Fed. 2d 175; *Aetna Casualty Surety Company vs. Yeatts*, 122 Fed. 2d. 350).

It is also true that this court held in *Slocum vs. New York Life Ins. Co.*, 228 U.S. 364 that when a judgment non obstante veredicto was entered, a new trial would have to be granted and that this decision was qualified by *Baltimore & Carolina Line Inc. vs. Redman*, 295 U.S. 654 which held that this would not be necessary if a motion for a directed verdict had been duly made and a decision expressly reserved thereon.

However, this court has never decided whether such a decision can be reserved by the trial court on its own initiative when no such motion was ever duly made.

It is also contended that this court should take jurisdiction of this case because the "Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter" (*Supreme Court Rule* 38, par. 5 (b)).

It is likewise contended that this court should grant this petition for certiorari because the Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision" (*Supreme Court Rule* 38, par. 5 (b)).

It is also contended that this court should take jurisdiction of this matter because the Circuit Court of Appeals, Sixth Circuit "has decided an important question of local law in a way probably in conflict with applicable local decisions" (*Supreme Court Rule* 38, par. 5 (b)).

The petitioner, William Boradus Mack, is a citizen of the State of South Carolina, the appellees, Peter Males and James Males are citizens of the State of Michigan (Record 40, 89, 124). It is undisputed that a diversity of citizenship exists.

In a civil case in a Circuit Court of Appeals it is competent for the Supreme Court to require by certiorari that the cause be certified to it for determination (28 *U.S.C.* par. 347 (a)).

The questions involved on this appeal are substantial. It is contended that in order to have proper trial practice it is necessary because of the guarantee of a trial by jury in the federal courts under the seventh amendment to the constitution of the United States, that it should be decided conclusively whether or not it is necessary for counsel to make a motion for a directed verdict before the trial court could enter judgment non obstante veredicto after the jury's verdict is rendered.

It is also contended that, irregardless of the question of a prior motion for a directed verdict, to allow a court to enter judgment non obstante veredicto when there was material evidence from which the jury could have found

for the other party is, in and of itself, a bold denial of the right to a jury trial and to a jury's verdict.

This court likewise has never expressed a policy concerning the actions of false arrest and malicious prosecution. Because of the many other constitutional guarantees that are involved in the propriety of such an action, it is submitted that the policy in regards to same be expressed by this court, so that a proper guide may exist for the trial of all such future actions in the federal courts.

III.

QUESTIONS PRESENTED

The questions herein presented are:

(1) May a trial court reserve decision on a motion for a directed verdict which was not in fact made and then enter judgment non obstante veredicto after the jury's verdict is rendered?

(2) Is a judgment non obstante veredicto which is improperly entered and upheld on the grounds that there was no material evidence upon which a reasonable jury could have found for the plaintiff a violation of the Seventh Amendment to the Constitution of the United States?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. That the Circuit Court of Appeals sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings in that it allowed a judgment non obstante veredicto entered by the District Court without any proper prior motion for a directed verdict, to stand. (*Supreme Court Rule* 38, par. 5 (b)).

2. That the lower court's decision is "in conflict with the decisions of another Circuit Court of Appeals" (Supreme Court Rule 38, par. 5 (b)), in allowing a judgment non obstante veredicto to be entered without a proper prior motion for a directed verdict being made (*Emanuel vs. Kan-*

sas City Title & Trust Company, 127 Fed. 2d. 175; *Aetna Casualty Surety Company vs. Yeatts,* 122 Fed. 2d 350.

3. That the question of whether or not it is necessary for a prior motion for a directed verdict to have been made before decision can be reserved thereon in order to enter judgment notwithstanding the verdict under Federal Rules of Civil Procedure, Rule 50 (b) is "an important question of federal law which has not been, but should be settled by this court" (Supreme Court Rule 38, par. 5 (b)), because it is necessary to insure proper procedure and practice before all the federal court and involves the constitutional question of the substantial right to trial by jury (Seventh Amendment, Constitution of the United States).

4. That the Circuit Court of Appeals Sixth Circuit erred in holding contra to applicable local law, that the question of malice in an action of false arrest and malicious prosecution was not one exclusively for the jury.

5. That the Circuit Court of Appeals, Sixth Circuit, in affirming judgment non obstante veredicto entered by the District Court when there was ample evidence from which the jury found for the petitioner, deprived the petitioner of his right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

V.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 10816, William Broadus Mack, also known as William Boradus Mack, appellant, vs. Peter Males and James Males, Appellees to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Cir-

cuit Court be reversed by the court, and for such further relief as to this court may seem proper.

Dated April 23, 1951.

Harry J. Lippman,
Attorney for Petitioner.

Earl C. Opperthauser,
Counsel for Petitioner.

STATE OF MICHIGAN

ss.

COUNTY OF WAYNE

On this 23rd day of April, A. D. 1951, before me a notary public in and for said County personally appeared Harry J. Lippman to me known to be the attorney of record for the within named plaintiff and petitioner, the same person described in and who did execute the foregoing petition and who did take oath and say that he did execute same on behalf of the within named plaintiff and petitioner with full knowledge of the facts therein set forth and with authority so to do and all of which facts are true of his own knowledge, except as to matters therein stated to be upon information and belief and as to those matters he believes it to be true.

Benjamin Knoppow,
Notary Public, Wayne County, Mich.
My commission expires: Oct. 19, 1954.

(SEAL)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. .....

WILLIAM BROADUS MACK, also known as WILLIAM BORADUS MACK,
Petitioner,

vs.

PETER MALES and JAMES MALES,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VI.

OPINION OF COURT BELOW

The opinion in the Circuit Court of Appeals for the Sixth Circuit (Record 311) is reported in 187 *Federal Reporter* 2d 334.

VII.

JURISDICTION

1. The date of the judgment to be reviewed is February 6, 1951 (Record 311).

2. The statutory provision which is believed to sustain the jurisdiction of this court is 28, *U. S. C.* 347 (a).

3. This is a civil action between citizens of different states (Record 40, 89, 124) which was tried in the District Court of the United States for the Eastern District of Michigan, Southern Division and appealed to the Sixth Circuit Court of Appeals (Record 3, 311).

4. The cases believed to sustain said jurisdiction are as follows:

Slocum vs. N. Y. Life Insurance Co., 228 U. S. 364;
Baltimore & Carolina Line Inc. vs. Redman, 295 U. S. 654;
Montgomery Ward & Co. vs. Duncan, 311 U. S. 243.

VIII.

STATEMENT OF THE CASE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

This is an action for unlawful detention, false imprisonment and malicious prosecution (4-25).

On September 6, 1947, the plaintiff, William Broadus Mack, attended a party at 1668 Philadelphia West, in the City of Detroit, Mich. (42). He was a resident of Seneca, South Carolina, and was in Detroit for the purpose of gaining entrance to Wayne University to continue a pharmaceutical education which was interrupted by induction into the Armed Services in June of 1943 (40-42).

Upon leaving this party and later attending a night-club, Mr. Mack, accompanied by a friend, one Felix Sloan and two girl friends who were their dates, took the one girl home and then later continued to drive the other home, who lived in Wayne, Michigan, some twenty-five miles distance (43). When returning, they were forced to stop by the side of the road and wait for a heavy fog to lift, and remained there until 8:15 A. M. of the following morning (44).

Later the same day, at about 8:00 P. M., Mr. Mack and his friend, Felix Sloan, left to take a trip out Jefferson Avenue past Belle Isle to see the lake (44).

When returning, the automobile was stopped by police officers under direction of one of the defendants, James Males, who identified the plaintiff positively as a bandit who had robbed him and his family earlier that morning (45-46).

Mr. Mack was then arrested and taken into custody (47), and was again identified by James Males at the McClellan Police Station in the City of Detroit as the supposed ban-

dit in question. He was then booked, fingerprinted and locked in a cell (47-48) until September 8, 1947, at about 3:00 P. M., during which time his belt, wallet and keys were taken from him and he was prohibited from getting in touch with relatives or friends (52). He was then handcuffed to an officer and taken to the Central Station and put in a large cell with twenty other men where there were no facilities for sleeping and was fed only coffee and buns twice a day. He was questioned intermittently, during which time he protested his innocence (53).

On the tenth of September, two of his uncles, one aunt and a lawyer were permitted to see him. During the questioning he told the police officers where he had been on the evening of the sixth and the morning of the seventh of September (53) as above related.

He was put in a show-up twice where he was identified as the bandit, on the first occasion, by Peter Males (54).

On the eleventh of September he was finally taken to court, after a warrant had been issued, and bond was set for five thousand dollars and two sureties, at which time he was remanded to the County Jail and placed again among criminals with whom, prior to this experience, he had never been associated with (55).

On the twelfth of September, 1947, he was released on bond arranged by his uncle on his request. The bond cost $500.00 which he agreed to pay.

On the twenty-third of September, 1947, he was required to appear in court for examination where Peter Males testified against him, and he was held for trial (55).

About three weeks later he appeared in court on arraignment when he plead not guilty because he was not guilty, and was remanded for trial which came up on the third of December, 1947, and continued until the eleventh of December, 1947. The defendants testified against him and identified him. The daughter of Peter Males did not identify him as the bandit, and his wife was doubtful of his identity (56).

During the trial he was required to bring witnesses to the city for his defense and incurred various extensive obligations because of same (57).

Having gone through that experience, he feels morose at times and humiliated. Shame attends him even now

as someone might kid him about his experiences in the matter (58).

At the time of his arrest and questioning, James Males heard Mr. Mack tell the police officers that he was asleep on the road somewhere between Wayne and Detroit (149), and that another colored boy was with him. The questioning as to the alibi was in response to James Males' request (150), despite the fact that he was "sure" that Mr. Mack was the bandit (151).

At the time of the show-up, Carol Males, the only one seeing the real bandit in a lighted room, was not able to identify Mr. Mack as the bandit (155).

The alleged robbery in question occurred in the home of the defendants in the City of Detroit at about 4:45 A. M. on the morning of September 7, 1947, at which time the defendant, Peter Males, was awakened by his daughter's scream. He did not turn on the lights in his room, but it remained in darkness (90-91).

The bandit came into Peter Males' room, came up to his feet, and took his pants about six or eight feet from his face (92). The lights were off in the hallway, and it was dark in Peter Males' room (91). The bandit took about $300.00 from Peter Males' pants, and about the same amount from James Males (99).

When the bandit entered James Males' room he picked up money from the dresser, went through James' pants pocket and took money out, and also took a couple of suits in the closet (128). When the bandit watched James he would shut his eyes, then he would open one eye and watch him (138).

After the bandit went downstairs James Males went to his sister Carol's room and tried to get her up from bed. When she refused he went to his parents' room to get them up. After they refused he returned to his sister's room and as able to get her to their parents' room. On the way there he threw a bulb from a lamp downstairs to scare the bandit off. After getting everyone in the one room they shoved furniture against the door. Then James Males picked up an alarm clock and threw it through the window facing the neighbors' side drive. When the police arrived they took a report wherein it was stated that the bandit had herded the family into the room and locked the

door. This report was denied by James Males, claiming the foregoing to be the truth (142, 179, 279).

The description given to the police at the time of the first report of the robbery was that the bandit was twenty-eight years old, 5'10" or 5'11" tall, 145-155 pounds, no hat, light blue shirt, and pants with suspenders (281). This description as given was not a description of the plaintiff, William Mack. On the contrary, the only similarity was that Mr. Mack and the robber were both colored, Mr. Mack actually being twenty-two years old and weighed between 138-142 pounds (172).

At the time the Prosecuting Attorney's Office recommended the warrant they were not advised as to Mr. Mack's alibi, nor that the description as given the police upon investigation of the robbery did not describe Mr. Mack, and the assistant prosecutor thereof stated that if they were given such information by the complaining witness, this warrant would not have been recommended (166, 167).

Mr. Mack was acquitted at the trial for robbery armed (69), and brought this action for unlawful arrest and malicious prosecution on the grounds that his arrest, detention and prosecution was not based upon probable cause, that the defendants were motivated primarily by a purpose other than bringing an offender to justice in the arrest of the plaintiff, and that Peter Males did not disclose in good faith all the material facts within his knowledge bearing upon the plaintiff Mack's alleged guilt of the charge of robbery armed (297, 298).

Despite these facts and others appearing in the appellant's argument, and despite the fact that no proper motion for a directed verdict had been made prior to the rendition of said verdict, immediately after rendition of the jury's verdict the trial court entered judgment notwithstanding the verdict from which the Plaintiff and Appellant prosecuted an appeal to the Circuit Court of Appeals and upon affirmation by an opinion erroneously stating the law in that court, does now petition this court for a writ of certiorari in order that such judgment may be reviewed and the questions of law, constitutionality and public policy herein involved may be decided.

IX.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals, Sixth Circuit, erred in holding that it is not necessary to have an express motion for a directed verdict made before the trial court may reserve decision thereunder and later enter judgment notwithstanding the verdict.

2. The Circuit Court of Appeals, Sixth Circuit, erred in holding that there was no substantial evidence from which a reasonable jury could have found a verdict for the petitioner, and in so upholding the judgment non obstante veredicto entered by the trial court, violated the Seventh Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals, Sixth Circuit, erred in holding that the question of the defendant's malice was not exclusively for the jury.

X.

ARGUMENT

SUMMARY OF ARGUMENT

Point A.

In order for a trial court to reserve decision on a motion for a directed verdict and enter judgment non obstante veredicto, it is necessary that such a motion be so made in accordance with the Federal Rules of Civil Procedure, Rule 50, this being a question which has not been, but should be, decided by this court.

Point B.

If an appellate court affirms the trial court's judgment non obstante veredicto, finding that there was no evidence from which the jury could have reached the verdict rendered, when in fact such evidence was of record, this wrongful decision on the law was a denial of the right to the trial of the facts by a jury and as such a violation of the Seventh Amendment to the Constitution of the United States.

Point C.

The question of malice in an action of false arrest and malicious prosecution is under the applicable local law a question exclusively for the jury.

POINT "A"

In order for a trial court to reserve decision on a motion for a directed verdict and enter judgment non obstante veredicto, it is necessary that such a motion be so made in accordance with the Federal Rules of Civil Procedure, Rule 50, this being a question which has not been, but should be, decided by this court.

A motion for a directed verdict, the reservation of decision thereunder and the entering of a judgment non obstante veredicto are governed by the Federal Rules of Civil Procedure, Rule 50, which states:

> (a) "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. *A motion for a directed verdict shall state the specific grounds therefore.*"
>
> (b) "Whenever a motion for a directed verdict made at the close of all the evidence is denied, or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, *a party who has moved for a directed verdict* may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * * " (Italics supplied)

This rule expressly requires that the party making same shall state the specific grounds upon which it is made. Another portion of the rule gives the right to move for judgment non obstante veredicto only to a party who *has moved* for a directed verdict. When one does not move for a directed verdict in accordance with the court rule, he has made no grounds upon which a judgment non obstante veredicto can be entered.

In *Emanuel vs. Kansas City Title & Trust Company*, 127 Fed. 2d 175, the court stated (176):

> "But if the plaintiff intended to appeal in case the verdict went against him and to challenge the sufficiency of the evidence to support a judgment for the defendant, *it was essential that he request the trial court to direct the jury to return a verdict in his favor* and that he secure from that court a ruling upon his request. In the absence of such a request and ruling, the question of the sufficiency of the evidence to support the verdict and judgment is not subject to review by this court."

This rule was reiterated in *Aetna Casualty Surety Company vs. Yeatts*, 122 Fed. 2d 350 (at page 352) thusly:

> "But here there was no motion for directed verdict to serve as a basis for the motion for judgment non obstante veredicto; and such judgment can be entered on the ground of the insufficiency of the evidence *only where motion for directed verdict has been duly made.*" (Italics supplied)

It is thus submitted that in order to enter a judgment notwithstanding the verdict, it is necessary that *a motion to dismiss* must be *duly* made in accordance with the court rules.

In the case at bar this was not done, the only motion made by the defendants and respondents was one to dismiss the case. If there was any other "motion" so placed on record, it was there only as a suggestion of the trial court and cannot be the basis of the entering of judgment non obstante veredicto and not offend the Seventh Amendment to the Constitution of the United States prohibiting

a federal court from re-examining the verdict of a jury other than in accordance with the common law.

The record discloses, that although the trial court suggested a motion for a directed verdict, the defendants did not wish to make that particular motion and did not in fact do so (245-247).

> "MR. GELFUND: If the Court please, the defendants rest.
>
> I desire to make a motion at the present time. This is not a motion for a directed verdict. This is a motion to the court to dismiss the jury at the present time from this matter, and to consider the facts as a matter of law.
>
> There is plenty of authority in the State of Michigan to the effect that when the facts are not disputed, or are conceded, the question of want of probable cause becomes a question of law to be determined by the court, and the overwhelming weight of authority, both in England and throughout this country is that where those facts constitute a question of law, it would be error for the court to submit the question to a decision of the jury.
>
> Now, to consolidate that position, I will go one step further on the record in this court. I will concede that all of the facts developed by the plaintiff from the witnesses on this stand are true, as far as they go, except as they contradicted themselves in this courtroom, and subject to argument as to what those facts imply, or what the true implication from those facts is.
>
> We, therefore, have this situation now before the court: Conceded facts, the defendants resting, the case closed, and under those circumstances, and I can cite the law if the court desires me to, and there is law cited in my brief —
>
> THE COURT: (Interposing) I think, Mr. Gelfund, what you want to do here is to get your motion properly on the record, and then we can argue it afterwards, if it seems advisable.
>
> MR. GELFUND: Yes.
>
> THE COURT: In the first place, you say, as a matter of law, that the record, as it now stands, shows

that both defendants had probable cause, as that term is meant and understoood in Michigan.

MR. GELFUND: We say this, your Honor: If I were making a motion for directed verdict, I would have done that, but my action is a request to the court to consider all of the facts that have been submitted, and to make a decision for plaintiff or for defendants as your Honor may construe that evidence, on actually the two issues involved here, probable cause, burden of proof and malicious intent.

THE COURT: I will tell you in advance that I am going to overrule your motion and submit the case to the jury; that is, I will overrule the motion that you have just made, and reserve the decision on your motion for a directed verdict, but what I was anxious for you to do was to be sure that you have everything on the record here so that you can use it later if you want to.

I see nothing inconsistent with asking the court to find, as a matter of law, that the plaintiff has failed to prove that either defendant did not have probable cause for believing that the plaintiff was the bandit.

Now, I think for the purpose of having this thing settled when we get through with it, you can make a motion for a directed verdict, first, on the ground that there is no evidence, no substantial evidence, to support a verdict, if such a verdict were rendered for two reasons:

In the first place, the record is clear that the defendant had probable cause.

Second, that there is no evidence of malice on the part of the two defendants.

Now, whatever else you want in there should be put in there now.

MR. GELFUND: I did not make that particular motion up to this point for the reason that, in all frankness, that motion presumes that there are no facts which would support a jury finding those two elements. I believe personally that there are no such facts, and if there are no such facts in dispute, I think it is a fine distinction that I am coming to.

THE COURT: I think I understand you.

MR. GELFUND: If there are no facts in dispute, there is nothing to submit to the jury as a question of fact. Taking all the facts as produced, we have only a question of law, and there are yards and yards of Michigan decisions which are exactly that. It says that if there are no facts in dispute, or if the facts are conceded, your Honor, and I here on the record am conceding everything that the plaintiff has produced, as I said, subject to the one of implication, and subject to the contradictions within the testimony of each witness. But that is all, there are no facts to submit to the jury under that sort of a proposal.

THE COURT: I will reserve my decision on your motion, in accordance with the provisions of Rule No. 15, and submit the matter to the jury."

The Appellate court stated in its opinion that the motion which actually was made was in substance a motion for a directed verdict. The record above set forth, it was earnestly submitted, shows otherwise, but that is a question on the merits. The questions before this court on this petition is whether or not this court should review the case in the interests of preserving uniformity of decision throughout the Federal Courts and whether this court should hear this case in order to decide the question of procedure and constitutionality in reference thereto concerning the power of a trial court to in effect reserve a decision on a motion for a directed verdict which was in fact never made by a party to the suit, but was only suggested or made by the trial court. The petitioner submits that this is indeed a substantial question worthy of consideration by this honorable court.

POINT "B"

If an appellate court affirms the trial court's judgment non obstante veredicto, finding that there was no evidence from which the jury could have reached the verdict rendered, when in fact such evidence was of record, this wrongful decision on the law was a denial of the right to the trial of the facts by a jury and as such a violation of the seventh amendment to the constitution of the United States.

This court has recognized the difference between a question of fact and a question of law as it applies to the entry of judgment non obstante veredicto. (*Baltimore & Carolina Line vs. Redman*, 295 U. S. 654); (*Montgomery Ward & Co. vs. Duncan*, 311 U. S. 243). The transition of a question from one of fact to one of law occurs when there is no material evidence from which a reasonable jury could have found for the party upon whom the onus of proof is imposed (*Simmonds vs. Capital Transit Co.*, 147 Fed. 2d 570).

It was this court's decision in the *Baltimore & Carolina Line Inc. vs. Redman* case, supra, that the entry of judgment non obstante veredicto did not contravene the right to trial by jury *if* the trial court expressly reserved its decision on a motion for a directed verdict, as such question was a question of law. In so doing this court qualified its prior decision in *Slocum vs. N. Y. Life Ins. Co.*, supra.

However logical this qualified decision was, it should be kept in mind that by so allowing such action on the theory that it is a question of law and not of fact, this court was permitting the lower courts to contravene the right to a jury trial and to a jury's verdict by taking the case from the jury on an erroneous decision, or upon a mere pretext, that there was no material evidence upon which a jury could have found the verdict which they rendered.

It is earnestly submitted that the action taken in this case by the lower courts did contravene these very rights by what appears to the petitioner to be a very lax enforcement of the constitutional provision regarding a jury's verdict, thus in effect establishing a public policy for the federal courts, at least of the Sixth Circuit, that the proof necessary to establish a verdict in a false arrest and malicious prosecution case which would not be set aside by the court, must be proof that is overwhelmingly in favor of the plaintiff.

The policy of this court in the matter of public policy concerning the civil action of false arrest and malicious prosecution has never been expressed. It is contended that only by so hearing this case and rendering a decision thereon will this matter be decided for the future guidance of the federal courts.

This is a substantial question because so many constitutional guarantees will be jeopardized by the establishment of a public policy against well founded honest suits to recover for damages as a result of any false arrest and any malicious prosecution.

The constitutional guarantee against illegal searches and seizures (*4th Amendment, Constitution of the United States*) will be imperiled. So will the guarantees of due process of law (*4th and 14th Amendment, Constitution of the United States*).

There will be for all practical purposes no civil redress as a deterrent against any false accusation causing false arrest and malicious prosecution of citizens of the United States.

Now, as to probable cause, the very circumstances upon which the Appellant was "discovered" and accused by Defendant and Appellee James Males, who immediately caused his arrest and confinement should cause even a person who was not "reasonably cautious" to doubt if the Plaintiff and Appellant was really the alleged criminal.

Is it reasonable to believe that in a city the size of Detroit and with a population of some two million people, that a person robbed early one morning would "by chance" accidentally "find" the robber some few hours later that same evening while driving supposedly nonchalantly down a city street?

Is it an ordinary cautious person who accuses another so positively as one who committed a crime like robbery armed under such circumstances and when he could not even remember, the means necessary to identify him, such as the color of the shirt the alleged bandit wore (184-186), or whether he had a light or heavy mustache (101-102), or what age or weight, or height he was supposed to be (142-144)?

It cannot be denied that the Appellant's arrest was caused by the Appellee, James Males (150-151), nor that his confinement, detention and prosecution were caused by both defendants and appellees (108).

It cannot be denied that the entire arrest and prosecution was brought against the Appellant on the strength of the positive identification of him as the bandit by the Appellees, and for that reason and that reason alone! There

was not the slightest other fact tending to establish his guilt. In fact, every other fact pointed to his innocence.

Mr. Mack, the Appellant, told of his whereabouts at the time of the alleged robbery as soon as he knew of what reason he had been arrested and was being held for prosecution, and such was heard by the defendant James Males (148-150).

In spite of all these uncontroverted facts, and in spite of the fact that the daughter, Carol Males, was the only person who had seen the bandit in a lighted room and said that the Appellant was "not him" (230), and in spite of the fact that Appellant's counsel admitted that the appellant did not commit the crime (42), the trial and appellate courts held "that there was no substantial evidence taken in the light most favorable to the petitioner from which the jury could have reached a verdict."

If the decision of the Circuit Court of Appeals, Sixth Circuit is left to stand in the case, the first fundamental of our criminal law, declaring that a man is innocent until proven guilty beyond a reasonable doubt, will have no civil counterpart which requires one to have at least probable cause to suspect one of crime before he sets the criminal law in motion against him to deprive him of his liberty and smear his character as an honest law abiding citizen for the rest of his life.

POINT "C"

> "The question of malice in an action of false arrest and malicious prosecution is under the applicable local law a question exclusively for the jury."

This point was clearly argued to the trial court and presented in the briefs to the Circuit Court of Appeals as filed therein, nevertheless, the opinion of the Circuit Court of Appeals as reported in 187 Federal Reporter 2nd Series, 334 (311) holds in part:

> "And inasmuch as the record reveals no substantial evidence that the defendants acted maliciously in so doing;
>
> The judgment of the district court entered non obstante veredicto is affirmed."

In so holding the Circuit Court of Appeals, Sixth Circuit erred and decided a substantial and important question of local law in conflict with applicable local decisions.

That is clearly shown by the Michigan decisions which hold that the question of malice is never a question for the trial court, but because of its intrinsic nature dealing with the state of mind of the defendant, akin to that of conspiracy, it is a question exclusively for the jury.

The leading authoritative case in Michigan on the subject is *Hamilton vs. Smith*, 39 Michigan 222, wherein it was stated, at page 228:

> "The proposition that the prosecution must have been malicious requires but few words.
>
> If in any case the jury under proper instructions had reached the conclusion that probable cause existed, or are led to think in view of all the circumstances, that the want of it has not been made out, the case is at an end.
>
> However base the proceedings may have been the action must fail. A necessary ingredient of the cause of action charged is wanting. But supposing the want of probable cause to be made out, it is then requisite to ascertain whether there was malice. For if it does not appear that the prosecution was malicious as well as without probable cause, again the action must fail, and it is possible, though very unusual, for a prosecution to be commenced or pursued without probable cause and at the same time without malice. *The question of malice unlike that of probable cause is exclusively for the jury.* The term is not used in this form of action in the sense often ascribed to it. It is quite comprehensive and includes many phases of wrong motives and conduct. There may be ill will, malevolence, spite, a spirit of revenge, or purpose to injure without cause, but it is not necessary that there should be. If the prosecution is willful, wanton or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy, it is malicious."

The petitioner believes that the trial court and appellate court erred in holding that the question of malice was one of law, and not a question exclusively for the jury.

CONCLUSION

The entry of judgment notwithstanding the verdict of the jury, and despite the fact that the jury had found by special questions that there was a lack of probable cause and that both defendants were guilty of malice in instituting the arrest and prosecution of the petitioner, and without a prior motion for a directed verdict having been made was contra to the Federal Rules of Civil Procedure and the Constitution of the United States.

The facts that the respondents were guilty of contradictions and conflicting statements as they appear in the record gave the right to the jury to discredit all the testimony of the respondents and to give the full inference to the facts as they appear from the testimony of the plaintiff's disinterested witnesses.

The evidence, as heretofore pointed out, is very substantial in establishing a case of a want of probable cause. The question of malice under the decisions being one exclusively for the jury and generally inferred from a lack of probable cause, and there being no dispute as to the exoneration of the accused in the criminal trial, the petitioner had established a sound case judgment which should not have been taken from the hands of the jury and set aside.

RELIEF SOUGHT

The petitioner respectfully prays that the record of the Sixth Circuit Court of Appeals be certified to this court so that it may decide the substantial questions of law and issues of public policy which are herein involved and are of potentially grave public concern.

Respectfully submitted,

HARRY J. LIPPMAN,
Attorney for Petitioner.

EARL C. OPPERTHAUSER,
Of Counsel.

STATE OF MICHIGAN

ss.

COUNTY OF WAYNE

Harry J. Lippman of the City of Detroit, above State and County being duly sworn deposes and says that on the 23rd day of April, A. D. 1951, he did serve a true copy of the attached petition for a writ of certiorari and brief in support thereof upon Stanley Gelfund, attorney of record for the respondent thereon named by personally enclosing a true copy of same in an envelope addressed to him at his office at 3063 Penobscot Building, Detroit, Michigan and by then depositing such envelope, duly sealed and with postage fully prepaid thereon in the United States Mail at Detroit, Wayne County, Michigan.

Harry J. Lippman

Subscribed and sworn to before me this 23rd day of April, A. D. 1951.

Benjamin Knoppow,
Notary Public, Wayne County, Michigan.
My commission expires: Oct. 19, 1954.

(SEAL)